of the absolute bar of time to an action. Whatever advantages there may be in striking out stale actions, the vesting of a discretion in the court to grant relief in a just and proper case to a litigant from the strictness of the time-bar, given to English courts and the courts of other countries, needs no pleading. We would strongly recommend to Government to consider a suitable amendment to the Limitation Ordinance, 1953.

The appeal must therefore be allowed, but clearly only as to that part which refers to the payment of the $85,000. There can be no possible doubt as to the cause of action and the right of the respondent to his share of the profits and the ancillary orders relating to this claim. The respondent shall keep his costs in the High Court but shall have to pay half the costs of the appeal.

Order accordingly.

Solicitors: *Bashir & Co.; Mah-Kok & Din.*

TIO CHEE HING v. CHUNG KHIAW BANK LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 8 & December 8, 1980]
[Kota Kinabalu — Federal Court Civil Appeal No. 167 of 1979]

Practice and Procedure — Execution — Judgments entered more than six years ago — Leave of Court — Discretion of Court — R.S.C. 1957, O. 42 r. 23.

In this case the respondents had obtained leave to issue execution against the appellant on two judgments entered more than six years ago. The reasons given for the delay were that there were negotiations for settlement by arrangement. The appellant appealed.

Held: that learned trial judge had exercised his discretion properly in this case and there was no reason for the appellate court to interfere with his discretion.

FEDERAL COURT.

T.S. Sidhu (*R. Sethu* with him) for the appellant.

Alex Khoo for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal from the decision of the judge to grant leave to issue execution against the appellant on two judgments entered more than six years ago.

Where six years have elapsed, Order 42 rule 23 Rules of the Supreme Court 1957 (with certain differences that are of no materiality in the application for leave, now Order 46 rule 2, Rules of the High Court 1980) requires leave of the court to be obtained. The court has a discretion in the matter and may exercise its discretion in favour of the applicant if satisfied that he is entitled to issue execution and with the cause or causes of the delay.

Judgment was entered against the appellant in two actions (Civil Suits Nos. 181 and 182 of 1969), both on April 6, 1970. In each case, the appellant had failed to enter appearance and judgment was entered in default of appearance. The former action was in respect of a charge to secure the repayment of a considerable sum of money advanced to a "Company" of which the appellant was the sole proprietor. The latter was for repayment of the overdraft granted to the appellant. Perhaps it was for the reason that there was possibly no defence to the actions that the appellant had at no time after the issue of the writs or the entry of judgment contested the validity of the claims against him.

The reasons for the delay were given by one Mr. Wong Theen Fook, the manager of the respondent Bank's Branch at Sandakan, in his affidavit in support of the application for leave. It was explained that after judgment had been entered, there were negotiations for settlement by arrangement. At that time, the appellant was making substantial payment by instalments towards another judgment sum in Civil Suit No. 260 of 1968 and clearly any further pressure on him would jeopardise the settlement of this debt without producing any favourable result in the satisfaction of the new claims. The Bank, perhaps not unreasonably, had hoped that so long as the appellant would be making his monthly or periodical payments, it might be in its own interests to give him time to pay off his debts to the Bank. Insofar as the land charged to the Bank was concerned, it was thought that sale by private treaty would fetch a higher sum, especially as the land was without potential for development. But as events showed, other creditors had also obtained various judgments against the appellant and had taken execution proceedings. It was time for the Bank to act in respect of these two judgment sums which had been entirely unsatisfied.

The learned judge found this explanation reasonable and unreservedly accepted it. He therefore exercised his discretion in the matter in favour of the application.

In so doing, he had not overlooked the very lengthy affidavit submitted by the appellant and the numerous exhibits annexed thereto — in all running to 80 foolscap pages. In it the appellant did not contest the validity of the Bank's claims against him. What he did do, in the main, was to give a history of his ventures in "agricultural development" and an explanation of his plight which he ascribed entirely to the machinations of the then State Government against him, especially in the matter of his application for land.

The learned judge formed the view that except for those parts in which the appellant referred to his attempts to settle the claims of the Bank, the affidavit was irrelevant to the consideration before him. And as events showed, the various proposals by the appellant to settle the claims of the Bank against him failed to produce any result. Nowhere had the appellant contended against the explanation that the reason for the delay in executing the judgments against him was to give him time at his request to resolve his financial difficulties.

For ourselves, we are unable, in all the circumstances of the case, to see how the learned judge had exercised the discretion vested in him wrongly. With respect, we entirely agree with his thinking and we accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shelley Yap Chong Chia & Co.; Peter Lo & Co.*